No. 90-8466

In The

Supreme Court of the United States

October Term, 1991

DAVID E. RIGGINS,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State Of Nevada

BRIEF FOR RESPONDENT

REX BELL
District Attorney

JAMES TUFTELAND*
Chief Deputy District Attorney

200 South Third Street
Las Vegas, Nevada 89155
Telephone: (702) 455-4711

Counsel for Respondent
*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

ISSUES PRESENTED

1. Whether a pre-trial jail detainee, who is being medicated with anti-psychotic drugs at his own request, has an absolute, constitutional right under the Sixth Amendment and Due Process Clause of the Fourteenth Amendment of the United States Constitution to terminate that medication for tactical purposes at trial.

2. Whether the Petitioner's Eighth Amendment allegation is barred from consideration by this Court for failure to present said claim to the state courts of Nevada and to this Court in his Petition for Writ of Certiorari.

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STATEMENT OF THE CASE

Petitioner David Riggins was charged by Information with one count of Murder With Use of a Deadly Weapon and one count of Robbery With Use of a Deadly Weapon (J.A. 15-17). A jury trial was conducted and the jury returned verdicts of guilty as to both counts (ff. 234-235). A penalty phase hearing was conducted before the same jury to determine the appropriate penalty for the murder with the use of a deadly weapon count. The jury returned a verdict of death (J.A. 50-51).

Petitioner appealed his conviction to the Nevada Supreme Court and his conviction was affirmed (J.A. 52-69).

A. SUMMARY OF GUILT PHASE TESTIMONY

On November 22, 1987, David Riggins was arrested in connection with the murder and robbery of Paul Wade (ff. 637-638).

Lowell Pendrey, David Riggins' roommate at the time of the offense, testified at trial that at about 1:30 a.m., on November 20, 1987, he drove Petitioner to the residence of Paul Wade, where Petitioner told him he was going to borrow some money from a friend (ff. 585-587). After about half an hour, Riggins returned, opened the car door and got in (f. 588). Pendrey recalls the Petitioner had a beer in his hand and began talking. His appearance was not out of the ordinary (f. 589).

At about 3:00 a.m., that same morning, Patricia Bezian, Paul Wade's girlfriend, drove home and discovered Wade's dead body (ff. 617-618). She went to the phone to dial 9-1-1, but discovered the phone cord had been cut (f. 618).

A postmortem autopsy revealed that Wade had received 32 stab wounds, including wounds to the head, chest and back, and that he had died from the multiple wounds (ff. 537-546).

Tom Austin, another of Riggins' roommates, testified that two weeks before the murder, Riggins informed him that he expected to come into some money or some cocaine (ff. 701-702). He also testified that four days

before the homicide he noticed two of his kitchen knives were missing (f. 703).

The Defendant took the stand in his own defense (ff. 709-743). The Defendant testified that Paul Wade had tripped over his ironing board and had stabbed himself in the heart (ff. 719-720). He testified that Wade stabbed himself in the forehead (f. 720). The Defendant further testified that he wrestled the knife away from Paul Wade, and was backing up as Wade kept charging him (f. 721). He subsequently testified that he stabbed Paul Wade eight more times in the back as he was defending himself (ff. 721-722). On cross-examination, the Defendant admitted cutting Paul Wade thirty-two times in two minutes (f. 732). He also admitted that he requested to be medicated with Mellaril (f. 740).

Additional testimony relative to the question of Defendant's sanity at the time of the murder is contained within the Argument.

B. SUMMARY OF EVIDENTIARY HEARING TESTIMONY

The robbery and murder were committed on November 20, 1987, and Riggins was arrested the following day. Prior to a preliminary hearing being held in Justice Court, defense counsel made an oral motion to have the case transferred to District Court for the appointment of psychiatrists to examine Riggins to determine his competency to participate in court proceedings (ff. 290-294).

The motion was granted without objection by the State (f. 292). Riggins was examined by Doctor Master and Doctor Jurasky (See J.A. 7-12).

After reviewing their reports, the district court declared in an order dated March 18, 1988, that Riggins was sane and competent to stand trial. The court then remanded the matter back to Justice Court for a preliminary hearing (J.A. 13-14). The preliminary hearing was then conducted on March 28, 1988, after which Riggins was held to answer the charges in District Court (ff. 295-400).

Riggins appeared in District Court for arraignment on the charges on April 11, 1988. Trial was then set for June 27, 1988 (See Court Minutes, f. 994).

On June 10, 1988, defense counsel filed a short motion which requested the trial court to issue an order directing the medical section of the County jail to terminate the administration of medication prior to and during his trial which was then scheduled for June 27, 1988. The motion was based on the Fourteenth Amendment of the United States Constitution and Art. 1 § 8 of the Nevada Constitution (J.A. 20-24). Concurrently with the filing of said motion, defense counsel also filed a notice which indicated the Defendant intended to rely upon the affirmative defense of insanity at trial (J.A. 25).

On June 28, 1988, the State filed an opposition to the motion to terminate medication. The State also requested that the court order additional psychiatric examination in order to help determine Riggins' sanity (J.A. 26-40). On

July 8, 1988, counsel for Riggins filed a responsive pleading to the State's opposition to terminate medication (J.A. 41-48).

An evidentiary hearing was held on July 14, 1988, at which Dr. Master, Dr. Quass and Dr. O'Gorman testified. Dr. Jurasky had been subpoenaed for the hearing but was on vacation at the time (f. 455). His report was provided to the court, however, and the contents and conclusions of his report were commented on by the other expert witnesses.

DR. MASTER

Dr. Master is a board-certified psychiatrist. He examined Riggins on February 7, 1988 (f. 404). The interview occurred at the County jail and lasted approximately one hour. The purpose of the interview was to evaluate Riggins for competency and sanity (f. 404).

Dr. Master was advised by Riggins that he was currently taking 450 milligrams of Mellaril per day (f. 404). He also advised Dr. Master that he had been under the care of Dr. O'Gorman and had been taking Mellaril for six years (f. 405).

When asked how the termination of the administration of Mellaril would affect Riggins, he replied that, after two or three weeks, one of two things would occur. If Riggins did actually have a thought disorder which required the ingestion of Mellaril to alleviate, then absent the medication, he would become grossly psychotic and illogical and therefore would be rendered incompetent.

If Riggins did not have a schizophrenic thinking disorder stopping the medication would have no effect, assuming that Riggins also abstained from street drug use (ff. 410-411).

Dr. Master testified that he had read Dr. Jurasky's report in which Dr. Jurasky concluded that Riggins was incompetent to stand trial and if the medication was terminated, Riggins would most likely regress to manifest psychosis (f. 411; J.A. 11-12, 18-19).

Dr. Master disagreed with Dr. Jurasky's evaluation of Riggins as suffering from schizophrenia (f. 412). He believed he was an anti-social personality with intermittent toxic psychosis (ff. 430-431). He therefore concluded that terminating the medication would probably not have a noticeable effect on Riggins' behavior (f. 412). However, Dr. Master did acknowledge that he had only seen Riggins once and at that time he was on 450 mg per day of Mellaril. The prosecutor asked him whether he believed Riggins would become incompetent if the administration of Mellaril were stopped. He replied that he did not think so but there was always that possibility (ff. 414-415). Dr. Master thought Riggins was manipulative and had the potential to fake psychosis in a courtroom setting (f. 413).

When advised that Riggins was currently on 800 mg of Mellaril per day, Dr. Master stated that he had not seen the medical records but would assume that an increase from 450 mg per day to 800 indicated that whoever prescribed the increase must have seen strong indications of worsening psychosis (f. 415).

Dr. Master noted that, in court, Riggins had been carrying on normal conversations and did not appear to

be sedated or groggy (f. 416). If the medication were terminated and Riggins began to manifest unusual or bizarre behavior, then he would need to be reevaluated to determine his competency.

If found to be incompetent it could take weeks to months of restabilization to return him to a state of competency (ff. 417-418). If the medication was terminated, it would take two to three weeks for the medication to completely disappear from Riggins' system. It would take another three to four weeks after termination before any signs of psychosis would appear (f. 419).

Dr. Master believed that at the time of the crimes, there was a strong possibility that the Defendant was under a toxic influence of cocaine and that the use of cocaine would have determined his mental status. Consequently, Riggins' courtroom demeanor at the time of trial would not be the same as his demeanor at the time of the commission of the crimes (f. 427).

DR. QUASS

Dr. Quass is employed by the Las Vegas Medical Center, which contracts with the County jail to provide medical services (ff. 438-439). He first saw Riggins in November, 1987, in response to complaints from Riggins that he was hearing voices and having trouble sleeping (f. 440). Riggins advised Dr. Quass that he had been prescribed Mellaril in the past and that it had worked for him (ff. 440-441).

The initial prescription was 100 mg per day. Because Riggins continued to complain of hearing voices and

difficulty in sleeping, the dosage was increased several times until the current dosage of 800 mg per day was reached (ff. 441-442, 447-449). Each time Dr. Quass interviewed Riggins, he believed him competent to stand trial. Dr. Quass believed that Riggins would remain competent even if the medication were terminated. He did not feel that Riggins was grossly psychotic, although he acknowledged the question of whether to terminate the medication was a judgment call and the possibility existed that Riggins could become psychotic if the medication was stopped (ff. 443-444).

Dr. Quass noted that a normal person taking 800 mg of Mellaril per day who was not psychotic would be very groggy and very drowsy. Dr. Quass observed that Riggins "obviously tolerates it very well." (f. 447). Because of Riggins' continued complaint of hearing voices, Dr. Quass believed it more prudent to maintain the medication (f. 451).

Dr. Quass thought Riggins suffered from a paranoid personality but did not believe he was schizophrenic. A person with a schizophrenic personality tends to lose touch with reality whereas a paranoid personality does not (f. 449).

When advised that Dr. O'Gorman could present testimony that afternoon, the court indicated that it would like to hear his testimony (f. 454).

DR. O'GORMAN

Dr. O'Gorman first met with Riggins on September 27, 1982. The Defendant complained of nervousness. Dr.

O'Gorman believed it to be an anxiety reaction that was caused by excessive use of hallucinogenic drugs (ff. 460-461). Dr. O'Gorman prescribed thirty milligrams of Mellaril per day for reduction of anxiety (f. 461). Dr. O'Gorman saw Riggins again in early October, 1982 and discovered that Riggins had, on his own, trebled the dose of Mellaril O'Gorman had originally prescribed (f. 462).

He next saw Riggins in March, 1988, at the County jail (f. 462). At that time, Riggins was taking 400 mg of Mellaril per day (f. 463).

The doctor testified that if Riggins continued to take Mellaril during trial he would be more calm and relaxed. The doctor stated, "He does have considerable anxiety when he has to – when he anticipates even going to court. He did mention that to me on the 5th of March." (ff. 464-465). The doctor added that Mellaril acts as an effective tranquilizer without producing any artificial state of well-being (f. 465).

Dr. O'Gorman reviewed Dr. Jurasky's report prior to testifying. With respect to Riggins' statement to Dr. Jurasky regarding hearing the voices of Satan and his assistant, Dr. O'Gorman thought that Riggins made it up to influence Dr. Jurasky's opinion of his mental condition (ff. 471-472).

When asked whether he believed the court should order the continued medication of Riggins for trial, he thought that the medication should be continued if Riggins appeared to be experiencing hallucinations but that the dose level should possibly be reevaluated (f. 475).

Although O'Gorman testified that 800 mg per day was a high dose, he noted that Riggins had a high tolerance for chemicals because of his longstanding history of drug abuse (ff. 473-474). When asked if he could express an opinion as to whether Riggins' courtroom demeanor would be affected by Mellaril he could not (f. 476).

O'Gorman's 1982 examination resulted in a diagnosis of schizophrenic reaction, undifferentiated type, secondary to the abuse of chemicals. It is a condition common to drug abusers. Riggins, in his view, was not a paranoid schizophrenic (f. 478).

When asked if he believed Riggins would remain competent if the administration of Mellaril was stopped, he did not know. He said that he would have to wait and see (f. 485).

At the conclusion of the testimony the matter was argued to the court and the court took the matter under advisement. Two weeks later, on July 28, 1988, the trial court signed an order denying counsel's motion to terminate medication (J.A. 49).

SUMMARY OF ARGUMENT

I

The State of Nevada has a compelling interest in rendering Petitioner competent for trial which outweighs his liberty interest in refusing medication. This Court has held that a significant state interest may justify the

infringement of a prisoner's or a pre-trial detainee's constitutional rights, and the State need not show a compelling necessity in justifying these infringements. The evidence presented at the evidentiary hearing was sufficient for the trial court judge to believe that medicating Riggins was reasonably necessary to maintain his competence. Nowhere in the record is there any objective evidence that Defendant was cognitively impaired by the medication, a factor of great significance in the argument that Petitioner does not have an absolute right not to be medicated against his will. Furthermore, defense counsel conceded, in his motion to terminate medication, the propriety of medicating Petitioner at trial in order to render him competent for trial.

The State's interest in the safety of Petitioner and others was legitimate in light of expert testimony that Petitioner might regress to "manifest psychosis" if taken off the medication and start "acting on his hallucinations."

Finally, the trial court concerns about undue delay were valid in light of testimony that it could take several months to render Petitioner competent if taken off the medication, and in light of the fact that trial was scheduled for only ten weeks away at the time of the evidentiary hearing on the motion to terminate medication.

II

a.

The State of Nevada argues that the right to present demeanor evidence is not encompassed in the Fourteenth

and Sixth Amendment rights to present a defense. However, even assuming the right to present a defense were found in these constitutional amendments, that right is not absolute and may bow to countervailing state interests.

Furthermore, demeanor evidence at trial, where there has been a lapse of time and other intervening factors, is of dubious probative value of a defendant's mental state at the time of the crime. Testimonial evidence of the defendant's mental state at the time of the offense is therefore preferable where taking a defendant off medication may render him incompetent.

b.

Because the Fifth Amendment privilege against self-incrimination applies only to testimonial or communicative evidence, Petitioner's argument that he was forced to be an "instrument of his own conviction" in violation of the Fifth Amendment, by appearing at trial in a medicated state, is meritless.

c.

In Nevada, competency is a jurisdictional requirement for a criminal prosecution. Therefore, Riggins can not waive his right to be competent at trial. Furthermore, this Court has held that the power to waive a constitutional right does not carry with it the right to insist on the opposite of that right. In light of the Constitutional principle protected by the Nevada rule, the right not to be

tried while incompetent, it is difficult to understand how Petitioner can assert that a constitutional right has been violated.

d.

There is no requirement in Nevada that a trial court make a written finding of fact with respect to a pre-trial motion to terminate medication. Furthermore, the record shows that the trial court went to extensive efforts to determine the necessity of continued medication in hearing from three psychiatrist at the evidentiary hearing.

III

Petitioner is precluded from raising the argument that the medication over objection of Petitioner violated his Eighth Amendment protection against cruel and unusual punishment, since he failed to raise this argument either on direct appeal or in his Petition for Writ of Certiorari.

Furthermore, Petitioner was never prevented from presenting evidence of his mental state at the time of trial or at the time of the offense. The compelling interest in rendering Petitioner competent for trial justified any restriction in the manner in which the evidence was presented.

Finally, in seeking to re-raise the issue of Defendant's sanity at the Penalty Phase, Petitioner is improperly asking the jury to reconsider its residual doubt over a crucial element of Defendant's guilt or innocence – his sanity.

ARGUMENT

I

THE STATE OF NEVADA HAS A COMPELLING INTEREST IN RENDERING PETITIONER COMPETENT FOR TRIAL, AND IN EXERCISING ITS PARENS PATRIAE POWER, WHICH JUSTIFIES THE INFRINGEMENT ON PETITIONER'S LIBERTY INTEREST IN NOT BEING MEDICATED AT TRIAL OVER HIS ATTORNEY'S OBJECTION

Nevada does not dispute Petitioner's contention that a criminal defendant has a significant liberty interest in avoiding the unwanted administering of medication. *Washington v. Harper*, ___ U.S. ___, 110 S.Ct. 1028 (1990). However, the State's interest in rendering Petitioner competent for trial and in ensuring the welfare of the Petitioner and others justifies an infringement of this interest.

Nevada Revised Statute (NRS) 178.400(1) states: "A person may not be tried, adjudged to punishment or punished for a public offense while he is incompetent." NRS 178.405 states, in relevant part:

> When an indictment or information is called for trial . . . if doubt arises as to the competence of the defendant, the court *shall suspend the trial* of the indictment or information . . . until the question of competence is determined.

Since the competence of a defendant to stand trial is jurisdictional in Nevada,[1] a defendant might,

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[1] At the evidentiary hearing on the motion to terminate medication, defense counsel conceded that competency is jurisdictional and competency could not be waived (f. 425).

theoretically, indefinitely postpone his trial on the merits if he is in a position to legally refuse to receive medication which may be necessary to maintain his competence.

Numerous state courts have held that rendering a criminal defendant competent for trial is a compelling state interest which justifies administering medication over defendant's objection. *State v. Law*, 244 S.E.2d 302 (S.C. 1978); *State v. Jojola*, 553 P.2d 1296, 1299-1300 (N.M. Ct.App. 1976); *State v. Buie*, 254 S.E.2d 26, 28 (N.C. 1979), *cert. denied*, 444 U.S. 971 (1979); *Ake v. State*, 663 P.2d 1, 6-7 (Okla. Crim. App. 1983), *rev'd on other grounds; State v. Stacy*, 556 S.W.2d 552, 557-559 (Tenn. Crim. App. 1977). In *State v. Law, supra*, the Supreme Court of South Carolina held:

> It is our view that medication may be administered without the consent of a defendant under compelling circumstances, including those where the medication is necessary to render a defendant competent to stand trial. We are of the opinion that such necessity would constitute a compelling state interest justifying infringment upon the right to bodily integrity.

Id. at 307.

This Court has also held that a significant state interest may justify the infringement of a prisoner's or pretrial detainee's constitutional rights. In *Harper, supra*, this Court held that the forced medication of a convicted prisoner would be upheld, even though it impinges on the inmate's constitutional rights, if such action is "reasonably related to legitimate penological interests." *Id.*,

S.Ct. at 1038, citing *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 107 S.Ct. 2400 (1987). The Court stated:

> The legitimacy, and the necessity, of considering the state's interest in prison safety and security are well established by our cases.

Harper, Id., S.Ct. at 1037. Although *Harper* involved prisoners already convicted of crimes, and not pre-trial detainees as in the case at bar, this Court has suggested that the State has a similar interest with respect to pre-trial detainees. *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861 (1979). In *Bell*, Justice Rehnquist held that the State may impose infringements on a pre-trial detainee in order to ensure the detainee's presence at trial and to ensure the effective management of the detention facility, *Id.* at 540, S.Ct. at 1875, and the State need not show a "compelling necessity" in justifying these infringements. *Id.* at 522, S.Ct. at 1870. In *Harper, supra*, this Court held that the State need only show that the forced medication was "reasonably related" to the State's legitimate penological interests, *Id.* at S.Ct. 1037, citing *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254 (1987), and held that the lower court's holding that the State prove its interest by "clear, cogent, and convincing" evidence was not the proper standard. *Id.* S.Ct. at 1044. Petitioner's contention that the State of Nevada is required to prove by "clear and convincing evidence" that medicating Riggins was necessary to achieve a compelling state interest is thus without merit.

The evidence showing the need to continue Riggins' medication throughout trial was presented at an evidentiary hearing held on July 14, 1988 (ff. 401-505). The trial court judge heard testimony from three psychiatrists, two of whom, Drs. Quass and Master, questioned whether

Riggins was truly schizophrenic, but who believed there was a possibility that if he was, he might regress to incompetency if taken off the medication (ff. 413, 444). The third, Dr. O'Gorman, could not say with any certainty whether Riggins would regress to incompetence (f. 476). The court also heard from a report prepared by Dr. Jurasky, who wrote that if taken off medication, Riggins would "most likely regress to a manifest psychosis and become extremely difficult to manage (f. 95).

There is also substantial evidence that Defendant was not cognitively impaired in any way by the medication, a fact of great significance in the Due Process analysis. Numerous state courts have held that in the absence of evidence that defendant's thought processes or the contents of defendant's thoughts were affected by the medication, there is no due process violation. See e.g. *State v. Jojola, supra; Jones v. State*, 71 Wis.2d 750, 238 N.W.2d 741 (1976); *State v. Arndt*, 1 Or.App. 608, 465 P.2d 486 (1970); *State v. Gwaltney*, 77 Wash.2d 906, 468 P.2d 433 (1970). Dr. Master testified at the evidentiary hearing that Mellaril renders a person rational, competent and logical, and that Riggins in fact appeared this way (f. 414). Dr. Quass testified at the hearing that anti-psychotic drugs such as Mellaril suppress a person emotionally but not cognitively, and that a person taking Mellaril would still have the ability to communicate, understand and to take part in courtroom proceedings (f. 446). Dr. O'Gorman also testified that he believes Mellaril controls emotions but does not affect a defendant's ability to communicate and assist his counsel (f. 466). Although no evidence of Petitioner's demeanor or cognitive abilities was presented at trial, Dr. Jurasky testified at trial that, in his opinion, the

Mellaril "allowed [the defendant] to act in a more or less normal manner" (f. 753), that Mellaril made the Petitioner "think more clearly" (f. 761), helped him communicate more effectively and "actually enhances his ability to take part in court proceedings" (f. 762).

In light of the facts on the record, references in Petitioner's brief to his "zombie-like appearance" at trial are pernicious and irresponsible. All references in Petitioner's brief to the "apathetic", "flat", and "emotionless" state of Petitioner are simply not supported in the record. It is inconceivable that defense counsel would have proceeded with the trial if Petitioner indeed appeared as a zombie throughout trial or was unable to assist counsel at trial. The repeated references in Petitioner's and Amici's briefs to Dr. Jurasky's statement that 800 milligrams of Mellaril is "enough to tranquilize an elephant" are equally disingenuous. The statement, a gratuitous and non-responsive comment by Dr. Jurasky during the prosecution's cross-examination, is obviously hyperbolic and was not supported by any scientific authority. It was merely his way of explaining that 800 mg per day was large dose, a fact not disputed by the State.

Furthermore, although Petitioner claims in his brief that the "State does not advance its interest in 'prison safety or security' or contend that Riggins would be dangerous to himself or others without medication" (p. 29), these were clearly concerns of the trial judge in determining that Riggins should remain medicated. In fact, Dr. Jurasky, in his pre-trial evaluations of Petitioner

on February 9, 1988 and June 8, 1988, wrote that Petitioner "must be considered potentially dangerous to himself and others" (f. 94) and "if taken off medication [the petitioner] would most likely regress to a manifest psychosis and become extremely difficult to manage." (f. 95). When informed of the potential side-effects of Mellaril, the trial court judge requested records from the County jail to determine if Petitioner was receiving or needed additional medication to counteract these effects and asked defense counsel for follow-up with that concern (ff. 98-99). It is clear, despite Petitioner's contentions, that the well-being of the Petitioner and the safety of others was of concern to the court. The State clearly had a legitimate interest in seeing that Riggins received appropriate treatment.

Finally, and despite Petitioner's allegations, the trial court's concerns about undue delay were valid. Drs. O'Gorman and Master testified that there existed a possibility that if taken off the medication, it could take two to three weeks for any psychotic regression to manifest itself (ff. 410, 487), then weeks or months of renewed drug therapy to bring Petitioner back to competence (ff. 417, 489). Petitioner points out that the trial did not take place until more than four months after the evidentiary hearing, and alleges that there was thus ample time to observe Petitioner's behavior off medication and re-medicate him should he relapse into psychosis. However, on the date Petitioner filed the Motion to Terminate Medication, June 10, 1988, trial was set for June 27, 1988 – only seventeen days away. On the date of the evidentiary hearing for the motion to terminate medication, July 14, 1988, trial had been rescheduled for September 26, 1988,

less than ten weeks away. On September 19, 1988, one week before the set trial date, Petitioner obtained a continuance which brought the trial to its final date, November 7, 1988. Thus, the trial court had, at all times following Petitioner's motion to terminate medication, legitimate time constraint concerns.

It bears noting that defense counsel, in his motions to terminate medication, conceded the propriety of medicating Petitioner at trial in order to render him competent to assist counsel (J.A. 42). Petitioner's position now, that the competency of criminal defendant is not a compelling interest of the State and can be waived, is contradictory to his original position. The trial court was thus within its sound discretion in rejecting the proposal of experimenting with the effect of the drugs on the Petitioner.

II

THE STATE OF NEVADA HAS A COMPELLING INTEREST IN RENDERING PETITIONER COMPETENT FOR TRIAL, AND IN EXERCISING ITS PARENS PATRIAE POWER, WHICH OUTWEIGHS PETITIONER'S INTEREST, IF ANY, IN PRESENTING HIS "NATURAL DEMEANOR" AT TRIAL

A. The State Interest In Rendering Petitioner Competent For Trial And In Ensuring The Welfare And Safety Of Petitioner And Others Justifies The Infringement, If Any, On Petitioner's Sixth And Fourteenth Amendment Right To Present A Defense.

The infringement on Petitioner's Fourteenth and Sixth Amendment rights to present a defense, if any, was

also justified by the state's interest in rendering Defendant competent for trial and in ensuring the welfare of the Petitioner and others. Furthermore, although the Fourteenth and Sixth Amendments grant a criminal defendant the right to present a defense, this right does not encompass the right to appear unmedicated at trial. The Petitioner cites *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704 (1987), as holding that an accused's right to present his own version of the facts "is one of the rights that 'are essential to due process of law in a fair adversary process.' " In *Rock*, this Court held unconstitutional a state law that made hypnotically-induced testimony inadmissible per se. In the majority opinion, Justice Blackmun wrote:

> The right to testify on one's own behalf at a criminal trial . . . is one of the rights that 'are essential to due process of law in a fair adversary system.'

Id. at 51, S.Ct. at 2708, 2709, citing *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 2533 (1975). Because the per se rule of inadmissibility arbitrarily excluded material portions of the defendant's testimony, the majority held, it violated the defendant's Fourteenth and Sixth Amendment rights "to offer his own testimony," to "personally" make his defense, and "to present his own version of events in his own words." *Rock*, at 52, S.Ct. at 2709.

Whether or not the above rights are in fact found in the Sixth and Fourteenth Amendments, it is clear that the right to appear unmedicated at trial is not. While it may be said that laws which arbitrarily exclude testimony (see *Rock, supra*), which allow a trial judge to lecture a defense witness about the consequences of perjury, thus causing

the witness not to testify (see *Webb v. Texas*, 409 U.S. 95, 93 S.Ct. 351 (1972)), or which require a defendant wishing to testify on his own behalf to do so before all other defense witnesses (see *Brooks v. Tennessee*, 406 U.S. 605, 92 S.Ct. 1891 (1972)), unconstitutionally "drive a witness off the stand," it cannot be said that the State of Nevada's administering anti-psychotic drugs to the defendant in order to maintain his competence has the same effect. In the case at bar, the Petitioner actively participated at his trial, testifying at length and in detail about the events surrounding the murder of Paul Wade (ff. 707-742). The Petitioner was not prevented from presenting any material evidence or any other aspect of his defense as were the petitioners in *Rock*, *Webb*, and *Brooks*, et. al.

However, assuming arguendo, the right not to be medicated over objection at trial is encompassed in the Fourteenth and Sixth Amendment right to present a defense, this Court has acknowledged that a criminal defendant's due process right to present evidence is not absolute and must, at times, give way to countervailing interests, see e.g., *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499 (1948), *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593 (1972), and that a criminal defendant's Sixth Amendment right to present testimony is not absolute and may be outweighed by opposing interests of the trial process. *Rock v. Arkansas, supra*. In *Rock*, Justice Blackmun held:

> The right to present relevant testimony is not without limitation. The right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."

Id. at 55, S.Ct. at 2711, citing *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038 (1973). Long ago, this Court established, for example, that the interest in conducting an orderly court justifies the immediate punishment of courtroom disturbances, without hearing and without affording the offender the opportunity to present a defense. *In re Terry*, 128 U.S. 289, 9 S.Ct. 77 (1888). In *Chambers, supra*, this Court held:

> In the exercise of . . . [his right to present witnesses in his own defense], the accused, as is required by the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.

Id. at 302, S.Ct. at 1049. Rendering Petitioner competent for trial is clearly a compelling justification for the infringement, if any, of Petitioner's right to present a defense. Petitioner's allegation that no compelling state interest justifies the infringement of his fundamental rights is thus meritless, a position recognized by Amicus American Psychiatric Association at pp. 18-20 of its brief on behalf of Petitioner.

Furthermore, Petitioner's contention, that being prevented from presenting his "true demeanor" at trial deprived him of the right to present a defense, rests on an assumption that a defendant's courtroom demeanor is always probative of his mental state at the time of the offense – an assumption for which there is a significant degree of legal and scientific dispute. The probative value of courtroom demeanor has been considered by a number of state courts (see e.g. *People v. Hardesty*, 362 N.W.2d 787 (Mich. App. 1984), Appeal to United States Supreme Court denied 477 U.S. 902, 106 S.Ct. 3269 (1986); *State v.*

Hayes, 118 N.H. 458, 389 A.2d 1379 (1978); *Commonwealth v. Lourraine*, 390 Mass. 28, 453 N.E.2d 437 (1983); *In re Pray*, 133 Vt. 253, 336 A.2d 174 (1975); *State v. Maryott*, 6 Wash. App. 96, 492 P.2d 239 (1971)). Several of these courts, however, have held that the connection between the defendant's courtroom demeanor and his mental state at trial must not be overly attenuated. *Hardesty, supra*, at 797. In *Hardesty*, the Court of Appeals of Michigan held:

> A defendant's demeanor on the witness stand is probative of the issue of sanity only to the extent that the defendant's mental state at trial approximates his mental state at the time of the offense.

Id. In *State v. Hayes, supra*, the New Hampshire Court held:

> The defendant would not be entitled to have the jury view him in a state as free from the effects of medication as he would be after seven days, unless there is evidence that he was in such a state at the time of the crime.

Id. at 389.

In the case at bar, nearly one year had elapsed between the occurrence of the crime and the trial. There was evidence presented at the evidentiary hearing that Defendant was under the influence of cocaine at the time he committed the crime (f. 427). There is thus no support for the assertion that Defendant's demeanor at trial had any probative value towards proving his mental state at the time of the crime.

The American Psychiatric Association, in its Amicus Curiae Brief on behalf of Petitioner, states:

> . . . The actual evidentiary significance of demeanor in persuading the jury of the defendant's insanity at the time of a crime is not particularly strong. An individual's psychotic state may not be evidenced in his or her appearance or demeanor.

Id. at 16.

Amicus, in its brief for Petitioner, points out that the passage of time, the formal courtroom setting and the structured prison environment all may alter Petitioner's behavior between the time of the offense and trial (p. 17). In light of this, they conclude:

> The contention that [Petitioner's liberty interest in appearing before the jury as he appeared at the time of the crime] is so weighty as to alter the constitutional balance is untenable.

(p. 16). A more reliable means by which a criminal defendant may indicate his state of mind at the time of the offense, Amicus states, other than trying to "appear psychotic," is by presenting expert psychiatric and other testimony at trial (p. 17). This, of course, is precisely how the trial was conducted. Dr. Edward Quass testified that although he could not form an opinion as to David Riggins' mental state prior to his examination of the defendant, sometime between November of 1987 and January of 1988, (the murder was committed on or about November 20, 1987), he was rational and coherent at the time, with a hint of paranoia (ff. 781-782). He diagnosed him as having probable paranoid disorder (f. 785). Dr. Quass testified that in all the times he saw Riggins, his behavior

was consistent with someone who knew right from wrong (f. 788).

Several witnesses were called to testify as to Riggins' actual appearance on the night of the offense and the day after. Lowell Pendrey, David Riggins' roommate at the time of the crime, drove Mr. Riggins to the victim's house on the night of the murder (f. 586). He testified that after dropping Mr. Riggins off at the victim's house, he waited for approximately thirty minutes for Petitioner to return (f. 588), at which point, he testifies, "[Riggins] opened the door, sat down, and I believe that he had a beer in his hand and he started talking. Nothing out of the ordinary." (f. 589). Pendrey further testified that on Saturday, November 21st, 1987, Riggins appeared sick and nervous: "He just wasn't his normal self." (f. 592).

Mr. Mark Austin, the brother of another of Riggins' roommates, testified as to the following exchange with Riggins on the morning after the murder:

> A . . . He came out of his bedroom and I asked him how he was doing –
>
> Q Okay, who is he?
>
> A Dave.
>
> Q Okay.
>
> A And he said fine, and he'd been hiding from the police. And I asked him why. And he said that he was a murder suspect. And I asked him if he did it and he said no. And he produced a newspaper article showing the whole thing in detail.

(f. 649). Austin described Riggins as a little nervous and "kind of proud of the article." (f. 650). He denied that

Riggins was acting strange, but indicated that he appeared nervous and exhibited some light shaking (f. 654).

Mr. Samual Griffin, an inmate at the Clark County Detention Center on November 22nd, 1987, the day Riggins was brought in, testified to his impressions of Riggins at the time. He testified that Riggins admitted committing the murder and robbing the victim (f. 604). He testified that Riggins stated that his victim had AIDS and was spreading his infected blood on cocaine he sold (f. 603). He stated that Riggins seemed weird (f. 607).

It is obvious that the jury heard a substantial amount of testimony regarding Riggins' mental state at the time of the crime, which they were able to evaluate and use in their determination of whether Petitioner met his burden of proof with regard to his plea of insanity. Obviously, the jury, in weighing the evidence, found that the testimony did not support the contention that Riggins was legally insane at the time of the offense. There is no indication that Riggins' demeanor at trial would have been more probative of his mental state at the time of the offense than was the evidence presented by witnesses.

As Amicus APA points out, "demeanor evidence" of a schizophrenic individual is fraught with practical problems (p. 17). An unmedicated defendant suffering from a schizophrenic disorder, even if competent at the commencement of trial, could regress into incompetence and disrupt the proceeding indefinitely. The trial court would be burdened with the obligation of ensuring the defendant's competence on a daily basis and with the potentially difficult task of recognizing a relapse should it

occur. Given that the alternative, presenting testimonial evidence of his demeanor at the time of the trial, has none of these attendant practical problems *and* is more reliable than "demeanor evidence," the State is clearly justified in its infringement on Riggins' right, if such a right exists, to present demeanor evidence.

Furthermore, other cases cited by Petitioner in support of his right to present his unmedicated demeanor at trial are readily distinguishable from the case at bar. In *In re Pray, supra*, the defendant was administered medication without being fully informed of the effects of the medication, and subsequently was unable to present to the jury evidence of his medicated state. In the case at bar, several expert psychiatric witnesses testified about the affects of Mellaril on Defendant's demeanor. In *State v. Maryott, supra*; and *Ake v. State, supra*, the defendants actually argued that the anti-psychotic drugs rendered them incompetent. No such argument has been put forth in the instant case.

B. Compelled Medication Did Not Infringe On Riggins' Fifth Amendment Right Against Self-Incrimination.

Petitioner argues that medicating him over his objection violated his Fifth Amendment rights in two ways: first, by making it easier for the State to rebut the evidence proffered by the defendant with regard to his sanity, thus undermining the requirement that the State "shoulder the entire load"; second, by forcing the defendant to, in essence, testify against himself by compelling him to appear unremorseful, apathetic and sane.

It is axiomatic that in a criminal trial, a defendant is innocent until proven guilty and the State must prove beyond a reasonable doubt every element of the crime charged. See e.g. *Taylor v. Kentucky*, 436 U.S. 478, 98 S.Ct. 1930 (1978); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970); *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691 (1976). However, where a murder defendant pleads not guilty by reason of insanity, the defendant bears the burden of proving to the jury, by a preponderance of the evidence, that he was insane at the time of the offense. Petitioner's allegation, that the State lessens its own burden by increasing the burden of Petitioner's affirmative defense, fails for several reasons. First, the requirement that the State prove every element of the crime, or "shoulder the entire load" is not found in the Fifth Amendment. Second, the decision to continue the medication did not preempt the defendant from presenting evidence of his insanity at trial, it simply restricted the type of evidence to testimonial evidence, evidence which is indeed much more probative of Defendant's mental state at the time of the offense. Petitioner was afforded every opportunity to present evidence of his insanity at trial through his own testimony and the testimony of his expert, Dr. Jurasky. It is clear that Petitioner simply failed to meet his burden of proof with respect to his affirmative offense of insanity. The prosecution did not rebut this defense by preempting the presentation of demeanor evidence, they did so by presenting considerably more reliable and relevant *testimonial* evidence of David Riggins' demeanor at the time of the offense.

Petitioner's allegation that the State violated his Fifth Amendment right against self-incrimination by forcing

him to be "an instrument of his own conviction" is equally meritless. The Fifth Amendment protection against self-incrimination applies only to testimonial or communicative evidence. *Pennsylvania v. Muniz*, ___ U.S. ___, 110 S.Ct. 2638 (1990); *United States v. Kasmir*, 425 U.S. 391, 96 S.Ct. 1569 (1976); *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951 (1967). In *Muniz, supra*, this Court held that the "slurring of speech and other evidence of lack of muscular coordination" revealed in a police station sobriety test did not constitute testimonial or communicative evidence for the purpose of the Fifth Amendment privilege against self-incrimination. S.Ct. at 2645. The *Muniz* Court cited Justice Holmes, who wrote in *Holt v. United States*, 218 U.S. 245, 31 S.Ct. 2 (1910):

> The prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.

Id. at 252-253, S.Ct. at 6. In the case at bar, Petitioner claims that his physical demeanor is testimonial or communicative evidence for the purpose of Fifth Amendment protection. Those aspects of Petitioner's behavior which he claims are affected by the medication, his "physical appearance and natural demeanor," are clearly aspects of his "body" and are not protected by the Fifth Amendment privilege against self-incrimination. Thus, even were there any evidence that Petitioner's demeanor was affected by the medication, and even were Petitioner's courtroom demeanor considered probative evidence in assessing the defendant's sanity at the time of the offense,

his demeanor is not testimonial or communicative evidence and is not protected by the Fifth Amendment.

C. The Power To Waive The Right Not To Be Tried While Incompetent Does Not Give Riggins The Right To Demand The Opposite Of That Right.

Petitioner alleges that because a criminal defendant may waive certain constitutional rights, as long as that waiver is made knowingly and intelligently and with adequate awareness of its consequences, he has the right to waive his right to not be tried while incompetent. In Nevada, competency is jurisdictional, and it is clear that a criminal defendant cannot, in fact, waive his right not to be tried while incompetent. Nevada Revised Statute (NRS) 178.400(1) reads: "A person may not be tried, adjudged to punishment or punished for a public offense while he is incompetent." NRS 178.405 reads, in relevant part, "[I]f doubt arises as to the competence of the defendant, the court *shall suspend the trial* . . . until the question of competence is determined." [emphasis supplied]. (See also, *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896 (1975); *Dogget v. Warden*, 93 Nev. 591, 572 P.2d 207 (1977); and *Melchor – Gloria v. State*, 660 P.2d 109 (Nev. 1983). None of the cases cited in Petitioner's brief, i.e. *Miranda v. Arizona*, 384 U.S. 436 (1966), *Faretta v. California*, 422 U.S. 806 (1975); *Taylor v. United States*, 414 U.S. 17 (1973), concern rights necessary for jurisdiction. While a court may obtain a waiver of a defendant's privilege against self-incrimination, (*Miranda, supra*), of a defendant's right to counsel, (*Faretta, supra*), or of his right to be present at trial, (*Taylor, supra*), a Nevada court does not have jurisdiction over an incompetent and thus cannot try him

under any circumstances, whether or not a knowing and intelligent waiver was obtained.[2] Defense counsel, furthermore, conceded at the evidentiary hearing on the motion to terminate medication that competency is jurisdictional and can not be waived (f. 425).

Assuming, arguendo, that a criminal defendant has the *power* to waive his right not to be tried while incompetent, this does not grant him the *right* to waive that right. *Singer v. United States*, 380 U.S. 24, 34, 85 S.Ct. 783, 790 (1965). In *Singer*, this Court has held that the power to waive a constitutional right does not carry with it the right to insist upon the opposite of that right:

> [A]lthough a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial, . . . although he can waive his right to be tried in the State and district where the crime was committed, he cannot in all cases compel transfer of the case to another district, . . . and although he can waive his right to be confronted by witnesses against him, it has never been seriously suggested that he can thereby compel the Government to try the case by stipulation.

Id. at 35, S.Ct. at 790. (citations omitted). In *Singer*, the majority held that a criminal defendant does not have the right to demand a bench trial simply by virtue of his right to waive a jury trial. *Id.* at 35, 36, S.Ct. at 790. By the same

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[2] For other state decisions holding that an incompetent cannot be subject to criminal proceedings, see *People v. Marks*, 756 P.2d 260, 248 Cal. Rptr. 874 (1988); *Miller v. State*, 751 P.2d 733 (Okl. Cr. 1988).

token, even assuming a defendant may, under some circumstances, waive his constitutional right not to be tried while incompetent, that ability does not grant him the right to insist on being tried while incompetent. The *Singer* Court stressed the importance of a jury trial in the framework of a criminal defendant's right to a fair trial:

> In light of the Constitution's emphasis on jury trial, we find it difficult to understand how the petitioner can submit the bald proposition that to compel a defendant in a criminal case to undergo a jury trial against his will is contrary to his right to a fair trial or to due process.

Id. at 36, S.Ct. at 790. Similarly, it is difficult to understand how Petitioner can argue that a state law designed to ensure his right to be tried while competent violates any aspect of Petitioner's right to a fair trial.

D. There Is No Requirement That The Trial Court Make Factual Findings In The Record.

Although the State recognizes the importance of adequate procedural safeguards in determining whether medication over Petitioner's objection is warranted, Nevada has no requirement that the trial court make a written finding of fact with regard to its denial of a motion to terminate medication. Petitioner cites Federal Rule of Civil Procedure 52(a) as "generally requiring" a finding of fact. However, that same rule provides:

> Findings of fact and conclusions of law are unnecessary on decisions of motions under

Rules 12 or 56 or any other motion except as provided in Rule 41(b).[3]

Fed. R. Civ. P. 52(a). See e.g. *Thomas v. Peyser*, 118 F.2d 369 (App. D.C. 1941); *Schad v. Twentieth Century-Fox Corp.*, 136 F.2d 941 (C.L.A. 3, 1943); *Prudential Ins. Co. of America v. Goldstein*, 43 F.Supp. 767 (N.Y. 1942); *Somers Coal Co. v. United States*, 2 F.R.D. 532, 6 Fed. Rules Serv. 52(a), Case 1 (Ohio 1942). The reliance on Rule 52(a) is wholly misplaced since the rules do not apply to Nevada criminal procedure and since, even if they did, Rule 52(a) does not require a finding of fact on decisions of most motions.

Furthermore, despite Petitioner's allegations, the record shows that the trial court went to considerable effort to determine the necessity of continued medication. (See Argument I, above). The court's reasoning, in deciding to continue the medication, is self evident in light of the testimony produced at the evidentiary hearing. The trial court judge was legitimately concerned with the possibility of court delay should Petitioner regress to incompetence shortly before or during trial (see f. 419), and was legitimately concerned that in his unmedicated state, Petitioner might "act on his hallucinations" and carry out his suicidal threats (f. 451). Petitioner's and the American Psychiatric Association's assertion (as Amicus) that the record cannot compel a finding of need to be medicated is thus without merit. The record shows the factual basis upon which the trial court judge made his decision. Although the American Psychiatric Association

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[3] Rule 41(b) refers to involuntary dismissal of an action and is thus not relevant to the issue on appeal.

has arrived at a different medical conclusion as to the Defendant's medicative needs, the trial court judge could have reasonably concluded that the medication was necessary based on the testimony he heard from psychiatrists who actually examined Riggins.

III

THE PETITIONER'S EIGHTH AMENDMENT ALLEGATION IS BARRED FROM CONSIDERATION BY THIS COURT FOR FAILURE TO PRESENT SAID CLAIM TO THE STATE COURTS OF NEVADA AND TO THIS COURT IN HIS PETITION FOR WRIT OF CERTIORARI

Petitioner alleges that being medicated over his objection unfairly prejudiced him in his effort to persuade the jury not to impose the Death Penalty in violation of the Eighth Amendment. However, Petitioner failed to raise this argument either in his direct appeal to the Supreme Court of Nevada or in his Petition for Writ of Certiorari. In light of this, the Eighth Amendment argument is not properly presented for review and is barred from consideration by this Court. Sup. Ct. Rule 24.1(a). See e.g. *Neely v. Martin K. EBY Construction*, 386 U.S. 317, 87 S.Ct. 1072 (1967); *J.I. Case Co. v. Borak*, 377 U.S. 426, 84 S.Ct. 1555 (1964); *California v. Taylor*, 353 U.S. 553, 77 S.Ct. 1037 (1957).

Assuming, arguendo, that this issue is within this Court's jurisdiction to decide, there is nonetheless no Eighth Amendment violation. A jury must be permitted to consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense." *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

Arguably, evidence of Defendant's mental illness, though not sufficient to prove Defendant was insane at the time of the offense, may serve as mitigating evidence at the penalty phase. Petitioner's allegations, however, fail for several reasons. First, Petitioner was not prevented from presenting evidence of his mental state at the time of the offense, and the state interest is rendering him competent for trial outweighed his interest in presenting the arguably relevant evidence of his demeanor at the time of trial. (See Arguments I and II, above). Unlike the cases cited by Petitioner, e.g. *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the jury in the case at bar was not precluded from considering mitigating evidence, they were merely restricted as to the form of the evidence they saw. As stated in Argument I, above, the compelling evidence in rendering Riggins competent for trial justified this restriction.

Second, Petitioner, in asking the sentencer to consider whether he was mentally ill, is asking the jury to reconsider the issue of Defendant's guilt. This Court held, in *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320 (1988). that juries need not revisit the issue of defendant's guilt or innocence:

> Our edict that in a capital case 'the sentencer cannot be precluded from considering, as a mitigating factor, any aspect of defendant's character or record or any circumstance of the offense . . . ' in no way mandates reconsideration, by capital juries, in the sentencing phase, of their 'residual doubts' over a defendant's guilt. Such lingering doubts are not over any aspect of petitioner's 'character,' 'record' or a 'circumstance of the offense.'

S.Ct. at 2327 [citations omitted].

In seeking to re-raise the issue of Defendant's sanity at the penalty phase, Petitioner is obviously trying to make this jury reconsider their residual doubts over a key element of Defendant's guilt or innocence for the crime – his sanity.

Third, as discussed in Argument II of this brief, there is nothing on the record that indicates that Riggins' demeanor was affected in any way by the medication. There is no evidence as to why Riggins chose not to read his statement to the jury and instead had defense counsel read the statement. It is pure speculation to assert that the medication made him unable to read it.

CONCLUSION

The judgment of the Supreme Court of Nevada should be affirmed.

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Respectfully submitted,

JAMES TUFTELAND
Chief Deputy District Attorney
Attorney for Respondent
REX BELL
District Attorney
200 South Third Street
Las Vegas, Nevada 89155

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